136

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PHILIP GARLAND
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Philip Garland
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QUESTIONS PRESENTED

Defendants in criminal actions often enter into plea agreements, or contracts, in exchange for their admission of guilt to the alleged conduct. In this context the defendant admits only what is contained in the written plea agreement. In exchange, the prosecutor is relieved of the burden to prove beyond reasonable doubt the substance of such admissions to obtain a conviction. Where, after acceptance of a plea agreement, a prosecutor makes statements of fact beyond what has been admitted to within a plea agreement, beyond anything proven or otherwise established, such statements mischaracterize the admission of guilt.

First Question

Does a plea agreement result in the creation of boundaries, comprised of the facts and limitations in scope of a defendant's admission of guilt, beyond which a prosecutor has no right to assert, as fact, said defendant's guilt - irrespective of context or use?

Second Question

Do post-sentencing factual assertions by a prosecutor that are beyond the scope of a criminal defendant's plea agreement, regarding unproven allegations never exposed to trial or subject of adjudication, amount to a unilateral governmental declaration of a defendant's guilt, or amount to an additional form of punishment without due process in violation of the 14th Amendment?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list of identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit.

Petitioner

Philip Garland

Respondents

United States of America

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DECISIONS BELOW

The unpublished decision of the United States Courts of Appeals for the Third Circuit was filed on January 30, 2008 and is attached hereto, and incorporated by reference, within Appendix A to this petition. A petition for rehearing was timely filed, and an entry of Judgment dated February 27, 2009 is attached as Appendix A. The unpublished decision of the United States District Court also appears within Appendix A to this petition.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1254(1). The date on which the United States Court of Appeals decided my case was January 30, 2009. A timely petition for rehearing was denied by the United States Court of Appeals on February 27, 2009, and a copy of the order denying the rehearing appears at Appendix A.

STATUTES INVOLVED

This case involves provisions of

U.S.C.A. Const. Amend. VI

U.S.C.A. Const. Amend. XIV

STATEMENT OF THE CASE

This petition presents an issue of first impression regarding a criminal defendant's right to rely upon and a prosecutor's requirement to respect the *boundaries* of a criminal defendant's admission of guilt contained within a plea agreement, where the prosecutor advances untrue post-sentencing statements to the court and into the record, as fact, never admitted, proven or subject of any adjudication. This case does not attack Petitioner's sentence or any of the proceedings leading up to the fulfillment of agreed-to incarceration and payment of a civil settlement. Rather, the dispute here is about a federal prosecutor's unrestrained and unchecked power to re-characterize a defendant's admission of guilt beyond what was pled to and where such defendant is left without an adequate remedy or forum within which to dispute the government's statements or conduct.

In the proceedings below Petitioner was subject of a criminal indictment that alleged a variety of offenses relating to the provision of gifts and loans to homebuyers and failure to disclose this information on financial documents submitted to the U.S. Department of Housing and Urban Development (HUD) to obtain government insured mortgages. The federal prosecutors alleged twenty-seven counts of false statements to HUD in violation of 18 U.S.C. §1010 and five counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of conspiracy to make false statements to HUD to obtain loans and commit mail fraud in violation of 18 U.S.C. § 371.

Petitioner vigorously contested the broad allegations contained in the indictment which led to

the formation of a plea agreement where he accepted responsibility for participation in and submission of three false statements contained within form submitted to HUD in connection with a single loan application submitted by a home buyer for an insured mortgage. Significantly, the offense conduct was limited to *one transaction* and the district court and the government accepted petitioner's *limited* factual admission. No other relevant conduct was ever admitted, subject of any adjudication or proven. Indeed, during the sentencing guidelines discussion, the government attorney referred to the transactions in the dismissed counts of the indictment, and stated: "[w]e are not saying that we have gone to trial and established those facts against Mr. Garland."

After agreeing to the limited factual basis supporting the plea, subject of labored and deliberate negotiations, the government's first arguments to the district court during Petitioner's sentencing immediately expanded to scope of facts admitted to by the defendant. The record reveals that Petitioner immediately objected and the government acquiesced acknowledging the limited factual basis found in the plea agreement.

As part of his plea agreement Petitioner wrote an article describing his offense and submitted it for publication to various trade magazines and newspapers. Petitioner also entered into a civil settlement agreement requiring, *inter alia*, payment of money to HUD. Petitioner complied with all the requirements under the plea agreement, including serving the agreed-to incarceration and payment in full of the amount of the civil settlement agreement.

Petitioner was released from federal prison on December 14, 2006.

On January 22, 2007, the government electronically filed a Sentencing Memorandum in support of its recommended sentence for Judy Gemmill, one of Petitioner's co-defendants (and the last to be sentenced). The Memorandum includes the following statement about Petitioner's involvement in the conspiracy: "[d]efendant Garland directed the fraud and made the most money from it." This statement is false: this description of Petitioner's conduct runs directly counter to what was admitted or proven against him, and there is no support for it within the record.

Petitioner sought to have the government voluntarily remove the statement. After the government refused to remove this statement, Mr. Garland filed a Motion to Strike the offending and untrue statement. On February 12, 2007, the district court commenced the sentencing hearing for Defendant Judy Gemmill after inexplicably moving the sentencing two days early *without* notice to Mr. Garland.

At that hearing, again without notice to Mr. Garland or his counsel, the district court solicited argument on the Motion to Strike from the government and from Ms. Gemmill's defense counsel, neither of whom had filed a response to the motion. Immediately following these *ex parte* oral arguments, the district court held that Mr. Garland had no standing to raise objections to the government's sentencing memorandum for Defendant Gemmill, and issued an oral Order denying Mr. Garland's Motion to Strike.

Because neither Mr. Garland nor his counsel had notice of this hearing, they were not present and were unable to respond. Procedurally, Petitioner was unable to obtain relief from the district court and sought relief by the filing of an interlocutory appeal. Substantially, the Third Circuit denied Petitioner relief on grounds that Petitioner had waived his right to appeal his sentence and any procedural matter related to his conviction.

The foregoing summary reveals 1) the formation of a plea agreement; 2) Petitioner's compliance with the terms of the agreement, which the government has never attacked; 3) statements made by the federal prosecutor that factually assert untrue statements about Petitioner that go beyond admitted or proven allegations; 4) denial of access to the court to Petitioner for redress; and 5) miscarriage of justice by the appellate court's failure to observe the limits or boundaries of the plea. Indeed, the Circuit Court's focus on Petitioner's appellate waiver overlooks the essence of the principal argument before the district and circuit courts.

ARGUMENT

This case presents an exceptionally important question of federal law because in the absence of this court's guidance, or of voluntary and responsible prosecutorial restraint, defendants who enter into a plea agreement remain at risk of post-conviction and post-sentencing *persecution*, even after fulfillment of sentencing requirements. In effect no one is safe if the government can continue to mischaracterize a defendant's admission of guilt with impunity. These statements also amount to an additional form of punishment for which there is no adequate forum

available for redress and the criminal defendant, like Petitioner here, is left without a remedy.

A defendant who voluntarily and knowingly enters into a plea agreement, even one that waives the right to appeal the conviction, sentencing or procedural matters leading up to fulfillment of the agreement, should be entitled to boundaries set out by such a contract. That is, where the factual basis is limited, any characterization of guilt by the prosecutor exceeding that limitation is wrong and can be damaging to the defendant. Such statements can never be within the scope of what the defendant agreed to not challenge by appeal. This is because the mischaracterization of an admission of guilt found within a plea agreement, especially where stated as fact and that exceeds that which has been admitted, is outside the written agreement. There is no mutuality between the parties evidencing the defendant's agreement that the government can reshape the admission of guilt. Therefore, there can be no waiver of the right to challenge the mischaracterization.

This court should grant the petition and establish a bright line for the lower courts and prosecutors to follow respecting the boundaries of plea agreements entered into by defendants who accept criminal responsibility for charged offenses. The enormous power granted federal prosecutors and the faith deposited in this institution by the people is at risk of evaporating if no one can trust that plea agreements will be complied with or enforced by the courts. Indeed, a prosecutor's motives and good faith must be questioned when he/she deliberately makes unfounded and untrue statements and then refuses

to recant the same even in the face of a clearly written plea agreement that speaks to the contrary.

FACTUAL BACKGROUND

The sequence of events here are as follows. Petitioner was indicted on a variety of alleged offenses. Assisted by counsel Petitioner entered into a negotiated plea agreement admitting to participation in a single transaction that contained three (3) false statements. Petitioner complies substantially with all of the conditions of the plea agreement. Petitioner also complies substantially with all the conditions of a separate civil settlement with the government requiring the payment of money. Then, the very next thing the government does after Petitioner's release form incarceration is to mischaracterize the scope of what was admitted to in the plea agreement – to which Petitioner strongly objected and moved for relief from the court.

Petitioner then files a motion to strike the untrue and unproven statement made by the government and the district court denies the motion on grounds that Petitioner lacked standing. The denial of the motion is made during a hearing held in the complete absence of notice to Petitioner or any opportunity to be heard. On appeal, the Third Circuit affirms the district court decision, which leads to the filing of a petition to this court.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been but should be settled by this Court. Review is necessary to give import to this court's holdings that a criminal

defendant has a Sixth Amendment right to proof beyond a reasonable doubt on facts used to impose a sentence higher than the statutory maximum and that criminal defendants have a right to rely on what they are knowingly and voluntarily agreeing to within their plea agreement. This Court should also grant this petition to provide guidance to the lower courts for enforcing limitations found within plea agreements and to reign in prosecutorial incursion into the rights of defendants who have successfully limited their admissions of guilt within plea agreements.

I. THE CIRCUIT COURT ERRED IN FAILING TO OBSERVE THE LIMITS OF THE PLEA AGREEMENT

1. Under principles of contract law, defendants taking plea agreements are entitled to the benefit of their bargain. Contracting parties are generally empowered to define the limits of their respective obligations. *Sepmeyer v. Holman*, 162 Ill. 2d 249, 205 Ill. Dec. 125, 642 N.E.2d 1242 (1994).

Though a plea agreement occurs in a criminal context, it is interpreted under general contract principles. Here, Petitioner's plea specifically bargained for a certain amount of stigma and no more: a public admission, in court, and in the press, of his conduct in one transaction only. The government's post-conviction, post-sentencing and post-imprisonment public statements exceed the bargained-for and agreed-to punishment, go well beyond the parameters of the plea agreement, and constitute a breach of that agreement and negate the waiver provisions.

The record shows that Petitioner negotiated with the government to limit the allegations against him to only one transaction; he would not have pled guilty to any more. The government's significant misstatement about Petitioner's role here is not merely a "parenthetical": Petitioner did not challenge an "ordinary line from a sentencing memorandum," but instead challenged a mischaracterization of his conduct – a public misstatement that is presented as fact, not as an allegation – that was at sharp odds with the conduct to which he plead guilty. Petitioner is not seeking to "clear" his name or refute allegations; he is simply asking that the government be required to keep their end of the bargain, and hold to what Petitioner pled to and agreed to, after the pre-trial motions and hearings, in his plea agreement.

2. The government argued to the Third Circuit that it was entitled to the "fruit of its bargain – the promise that the government would not be required to devote its resources to defend one appeal". In support of that argument it cited to *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001). This spin on the facts borders on deliberate misdirection because Petitioner's argument is exactly the opposite. In *Teeter*, the court observed bait-and-switch tactics by the defendant to avoid that which was agreed to. By contrast, Petitioner here agreed to a limited amount of admitted guilt, complied with all the requirements of the sentence and civil settlement. The government, however, has not respected the boundaries of the limited scope of Petitioner's admission of guilt, and, just like the government in the *Teeter* case, he draws attention to

his benefit of the bargain to which the government has ignored.

Apparently, the government does not like to be on the receiving end of the *Teeter* argument. The Circuit Court, however, was persuaded by the government's deliberate spin on the argument that put a magnifying glass on the appellate waiver and not on the boundaries of the plea. This is error that this Court should observe and correct.

II. THE CIRCUIT COURT ERRED IN FINDING WAIVER OF THE RIGHT TO APPEAL

A. The Waiver Argument is Inapplicable

Respondents argued to the district court, then to the circuit court of appeals, and will argue here, that Petitioner had waived the right to appeal the sentence with the signing of the plea agreement. Respondents point to the very language of the plea agreement in support of that argument, specifically where the agreement bars Petitioner from appealing or collaterally attacking his "conviction, sentence, or any other matter relating to this prosecution." The Circuit Court agreed with that argument.

However, Petitioner's counter-argument is two-fold. First, Petitioner's motion seeking to strike the statement from the government's pre-sentencing memorandum against the co-defendant did not attack the conviction, sentence, or any other matter relating to the prosecution. On the contrary, Petitioner's argument drew attention to the boundaries of the plea agreement and recognized that the statements made by the government exceeded those bounds. In effect, if the government

could make *any untrue* or *unproven* statement about a defendant, after sentencing and indeed after serving the sentence, where does it end?

The second part of the argument was also misunderstood by the Circuit Court in that the statements were made as part of a separate proceeding. The Circuit Court concluded that this argument "was untenable because the agreement specifically stated that the government was not limited in its comments in, and responses to, any post-sentencing matters". Of course at the time the agreement was made Petitioner could not have known that the government would mischaracterize the scope of his plea agreement. Therefore, Petitioner's understanding of the waiver could not have included the waiver of the right to challenge something outside the four corners of the plea agreement. What is not in dispute is the Petitioner's waiver of the right to challenge the government's statements of fact and truth *within* the scope of the agreement. Accordingly, the Circuit Court misinterpreted the plea and the appellate waiver provision, which is inapplicable here.

III. THE GOVERNMENT KNOWINGLY, WILLFULLY AND DELIBERATELY MADE STATEMENTS THAT EXCEEDED THE PLEA AGREEMENT

A. The Government Intended to Go Beyond the Limits of the Petitioner's Admission of Guilt

1. Immediately following the execution of the plea agreement the federal prosecutor in charge of

this case began to expand the scope of Petitioner's admission of guilt. There is evidenced of this within the record beginning with the first formal proceedings before the district court in which the substance of the plea agreement took center stage as part of the colloquy. The record reveals that the defendant/Petitioner entered into a plea agreement with federal prosecutor on March 29, 2005. On the same day, at the colloquy, after the district court's questions to Petitioner, about his understanding of his plea, the government presented their version of the facts and immediately expanded the scope of the written plea agreement. During the proceedings the government presented to the court an elaborate scheme to which Petitioner allegedly participated in, which included the commission of mail fraud offenses. However, Petitioner never admitted to the expanded scope of the government's allegations, nor was there ever any proceeding in which the elaborate scheme was shown to be true or proven. It was due to the falsity of the allegations that Petitioner was guarded about the scope of the specific admission of guilt that formed the basis of the plea agreement. Notwithstanding these limits, the government persisted in casting Petitioner as having guilt beyond that which he admitted.

The following exchange occurred immediately after the federal prosecutor's statements to the district court about the scope of Petitioner's guilt. (Inquiry by the court and responses by Petitioner; Ms. Foa for the U.S.)

Q. All right. Mr. Garland, did you hear Attorney Foa summarize the facts?

A. Yes, I did, Your Honor.

Q. Did you understand everything she said?

A. Yes, Your Honor.

Q. Do you fully admit to all those facts?

A. No, Your Honor.

Q. Which of those facts do you not admit to?

. . .

MR GARLAND: My conspiracy to make false statements to HUD involved one property. With respect to 2042 Wyatt Circle in Dover, the buyer did not have sufficient funds to close the deal. I authorized Judy Gemmill to offer funds to the buyer to assist in buying the home and did provide those funds. These funds would be represented as gift funds from a relative and a friend of the buyer and that the two gift letters would state that. The HUD-1 and HUD-1 addendum did not list me or Garland Construction, Incorporated as the source of those funds and that the gift letters, the HUD-1 and HUD-1 addendum are false in that regard. I knew and expected that these documents would be submitted to the lender, and that was a HUD-consumed loan – HUD-insured loan.

BY THE COURT:

Q. All right. Is that the completion of your statement, Mr. Garland?

A. Yes, Your Honor.

Q. But you don't admit to anything else?

A. Yes, Your Honor.

Q. All right.

THE COURT: Is that limited admission satisfactory to the Government?

Ms. FOA: It is, Your Honor.

THE COURT:

Is that limited admission consistent with the Government's understanding of defendant Garland's obligations under the plea agreement?

Ms. FOA: Yes, it is, Your Honor.

Transcript of Hearing on March 29, 2005 before the Honorable Judge James Knoll Gardner, in Allentown, Pennsylvania.

There can be no doubt that the government failed to observe the limits of the plea agreement by mischaracterizing Petitioner's admission of guilt in order to put an exclamation point on the sentencing of a co-defendant.

2. Insisting it had the right to make statements beyond Petitioner's clear and limited admission of guilt, a form of "blank check" approval by the plea agreement, the government has argued that the plea "expressly allows the government to discuss "evidence relating to dismissed counts" App. 52." The problem with that argument is that the government's assertion stated as fact about Petitioner's role in the purported "scheme" is not *evidence* relating to dismissed counts. The

government's manifest intent on making statements beyond Petitioner's limited admission of guilt is in plain sight, where the language of the plea states: "[n]othing in this agreement shall limit the government in its comments in, and responses to, any post-sentencing matters".

However, this sentence does cannot equate to a license for the government to mischaracterize the scope of Petitioner's admission of guilt. If prosecutors are permitted to arbitrarily or capriciously misstate what has been admitted to, there can be no confidence in the plea process or in the court's enforceability of such agreements. The government's position on this matter is patently self-serving, absurd and intended only to extend its awesome power to persecute beyond the plea.

IV. THE THIRD CIRCUIT ERRED IN CLOSING THE DOOR TO PETITIONER'S RIGHT OF ACCESS TO THE COURT

A. Petitioner was denied the right of access to the court and left without an adequate remedy

In this case Petitioner was denied the constitutional right to due process because if the district court is correct, no remedy was available for addressing the government's failure to abide by the limits of the plea agreement. In effect, the district court denied Petitioner rights under the 14th Amendment to the U.S. Constitution by determining that he had no standing to seek relief from the district court. This determination was made within an improper proceeding, where Petitioner was afforded no notice or opportunity to be heard. The

government seized this opportunity to argue *ex parte*, without any rebuttal, that Petitioner lacked sufficient standing to bring the motion. This legal issue was not addressed by the Circuit Court in its judgment.

Not only was the Petitioner's right of notice and opportunity to be heard truncated by the district court's sudden and unannounced rescheduling of the hearing, which advanced the hearing date by two days, Petitioner was left without any forum within which to seek the requested relief.

Therefore, deprivation of the right to due process is four-fold. First, Petitioner, having properly filed a motion, was not noticed that the court would hear argument on said motion. Second, the court heard argument from opposing counsel and decided the matter without Petitioner's direct or indirect involvement. Third, the court determined that Petitioner had no right to access the court for such a motion. Fourth, the Circuit Court erred in failing to observe the denial of Petitioner's right to due process.

The government will argue that Petitioner had waived the right of appeal or to seek relief as to anything related to his conviction, sentencing or post-sentencing matter, that argument fails, as stated in this petition, and is insufficient to deprive Petitioner of rights guaranteed under the 14th Amendment. In fact, the government has argued that Petitioner made full use of all of his rights to due process leading up to and including his sentencing. That argument, however, is not dispositive of whether Petitioner was denied the right to seek relief from the government's use of

statements that were never part of and were outside the scope of the plea agreement. Accordingly, that argument is unavailing and intended only to shift the focus away from the fundamental legal issue of Petitioner's rights under the 14th Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,
/s Philip Garland

Philip Garland
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Lancaster, Pennsylvania 17603

APPENDIX A

THIRD CIRCUIT OPINION AND JUDGMENT

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 07-1524

UNITED STATES OF AMERICA

v.

PHILIP GARLAND,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 04-cr-00137-1)
District Judge: The Honorable James Knoll Gardner

Submitted Under Third Circuit LAR 34.1(a)
January 16, 2009

Before: SLOVITER, BARRY, and SILER,[1]
Circuit Judges

Opinion Filed: January 30, 2009

OPINION

SILER, Circuit Judge

Philip Garland appeals the order of the district court denying his motion to strike a sentence in the government's sentencing memorandum filed in his co-defendant's case. For the following reasons, we will affirm.

I.

Garland and four co-defendants, including Judy Gemmill, were indicted for a fraudulent scheme

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[1] The Honorable Eugene E. Siler, Jr., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

involving mortgage loans insured by the government. Garland pled guilty to one count of conspiracy to make false statements to the government concerning the sale of one house, and in 2005 was sentenced to eighteen months in prison. Gemmill went to trial and was found guilty. As part of her sentencing in 2007, the government submitted a memorandum which compared her role to that of the other co-defendants, and stated in a parenthetical: "Defendant Garland directed the fraud and made the most money from it." Garland moved to strike the statement. The government did not respond and the motion was considered at Gemmill's sentencing hearing, without notice to Garland. After hearing arguments from the government and Gemmill's counsel, the district court denied the motion, finding that Garland lacked standing and that the court did not have jurisdiction to hear the motion. Despite

signing a plea agreement waiving the right to appeal, Garland appeals the district court's denial of his motion.

II.

A. Jurisdiction

After the notice of appeal was filed, the Clerk of Court sent a letter to counsel directing them to address whether the order was a final appealable order under 28 U.S.C. §1291. Despite making arguments that this court lacks jurisdiction in its response, the government may have waived this issue in its brief by asserting this court has jurisdiction. Therefore, we will assume jurisdiction under section 1291.

B. Applicability of Appeal-Waiver Provision

Garland asserts that this appeal falls into the exception to the appeal-waiver provision that appeal may be taken if his sentence exceeds the statutory

maximum. Garland was originally sentenced to the eighteen months that was agreed upon in his plea agreement. Any "public accusation" does not create additional punishment that would make this exception applicable. Additionally, he argues the appeal should be allowed because the government breached its obligations under the agreement by making additional unproven accusations against him in the memorandum. This is untenable because the agreement specifically stated that the government was not limited in its comments in, and responses to, any post-sentencing matters. Finally, he argues the waiver is inapplicable because a motion and appeal seeking to enforce a plea agreement is a separate proceeding. This is unavailing because the plea waiver barred him from appealing or collaterally attacking his "conviction, sentence, or any other matter relating to this prosecution."

C. Miscarriage of Justice

Garland argues that even if this court finds the waiver valid, it should not be enforced because doing so would work a miscarriage of justice. If the waiver is made knowingly and voluntarily, the appellate court should enforce it unless doing so would work a miscarriage of justice. *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001). We have endorsed the approach of the First Circuit in *United States v. Teeter*, 257 F.3d 14, 25-26 (1st 2001), when it outlined the following factors to be considered by the court in determining a miscarriage of justice:

> [T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the

> defendant acquiesced in
> the result.

Khattak, 273 F.3d at 563.

Garland does not argue that his appeal waiver was not entered into knowingly and voluntarily. Applying the *Teeter* factors here, it is clear that the gravity of the alleged error is extremely small – it concerns a parenthetical in a twenty-four page government motion in another defendant's case. This parenthetical does not hurt Garland's reputation any more than the information that was already on the public record regarding the alleged offense conduct.

III.

For the reasons stated above, we will affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1524

UNITED STATES OF AMERICA
v.
PHILIP GARLAND,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 04-cr-00137-1)

District Judge: The Honorable James Knoll Gardner

Submitted Under Third Circuit LAR 34.1 (a)

January 16, 2009

Before: SLOVITER, BARRY, and SILER,[2]
Circuit Judges

Opinion Filed: January 30, 2009

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[2] The Honorable Eugene E. Siler, Jr., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

JUDGMENT

This cause came to be heard on appeal from the United States District Court for the Eastern District of Pennsylvania and was submitted on January 16, 2009.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of the district court be and hereby is affirmed. All in accordance with the opinion of the court.

ATTEST:
/s/Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: January 30, 2009

smw/cc: Michael S. Blume, Esq.
Pamela Foa, Esq.
Ellen C. Brotman, Esq.
Karen M. Ibach, Esq.
Richard L. Scheff, Esq.

DISTRICT COURT ORDER AND TRANSCRIPT OF HEARING

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	Civil Action
	:	No. 04-CR-00137-3
v.	:	
	:	
JUDY GEMMILL,	:	
	:	
Defendant	:	

ORDER

NOW, this 13th day of February, 2007, upon consideration of Defendant Phillip Garland's Motion to Strike the Government's Sentencing Memorandum, which motion was filed February 5, 2001, and which Sentencing Memorandum was filed January 22, 2007, in the within matter of United States of America v. Judy Garland criminal action

number 04-CR-137-3; it appearing that co-defendant Garland who has been previously sentenced in criminal action number 04-CR-137-1, has no standing to raise objections to the government characterizations in its sentencing memorandum in the within matter, has not stated a jurisdictional basis for this court to entertain the motion and has not stated any legal authority in support thereof; it appearing, therefore, that the Garland Motion to Strike is not properly before this court; and for the additional reasons articulated by the government and the defense at the Gemmill sentencing hearing this date,

IT IS ORDERED that Defendant Phillip Garland's Motion to Strike is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	Civil Action
	:	No. 04-CR-00137-3
	:	
v.	:	
	:	
JUDY GEMMILL,	:	Philadelphia, PA
	:	February 12, 2007
Defendant	:	2:46 p.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JAMES KNOLL GARDNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For the Defendant:
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Also Present:
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

(The following was heard in open Court at 2:46 p.m.)

THE COURT: The matter before the Court this afternoon is the case of the United States of America versus Judy Gemmill, case number 04-CR-0 0137-3. The matter is before the Court today for a sentencing hearing. The defendant was found guilty after a jury trial of Counts 1 through 15 of a revised indictment.

The jury verdict of guilty entered on each of those counts was announced on May 6th of 2005. We will follow-up with some additional procedural details in a moment, but, before we do that, I would like to recognize and acknowledge the presence of the Assistant United States Attorney Pamela Foa --

MS. FOA: Good afternoon.

THE COURT: -- and the Assistant -- good afternoon - - and Assistant United States Attorney Michael S. Blume --

MR. BLUME: Good afternoon, Your Honor.

THE COURT: -- each representing the Government and

case agent -- the case agent on the file, Special Agent Allen
Rains from the FBI.

AGENT RAINS: Good afternoon, Your Honor.

THE COURT: Special Agent Rains, good afternoon.

And we note the presence of Court-appointed defense counsel,
Anna M. Durbin.

MS. DURBIN: Good afternoon, Your Honor.

THE COURT: Good afternoon, Attorney Durbin. And we note the presence of the defendant and Ms. Durbin's client, Judy Gemmill.

THE DEFENDANT: Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Gemmill. I also note the presence of Senior United States Probation Officer Donald E. Miller.

MR. MILLER: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Miller.

After the defendant's conviction, the defendant, through her counsel, filed on May 20th of 2005, defendant's motion for a judgment of acquittal. That matter was briefed, and I entered an order today denying the defendant's motion for judgment of acquittal.

There were actually two similar motions, one was a revised version of the original one, and one of them was docket entry, 266, the revised version, which I denied. And the earlier superceded version, docket entry, 265, I dismissed

as moot.

I am now serving on each of the three counsel present, the two Government counsel, and the defense counsel, copies of our February 13th order. As indicated in part of footnote two, I intend to file a memorandum articulating the reasoning and analysis and authority in support of this order.

Another procedural matter concerning this case, and this, in general, this sentencing in particular, is a motion which was entitled, defendant, Philip Garland's motion to strike together with a proposed order which was filed by Mr. Garland's counsel on behalf of Mr. Garland.

Philip Garland, as the participants well know, is one of the co-defendants in this case. And his case number is 04-CR-00137-01. But in this matter, in the matter of the sentencing of his co-defendant, Judy Gemmill, Mr. Garland, through counsel, filed this motion dated February 5, 2007, received in our office on February 7, 2007.

And, according to docket entry, 364, this motion was filed on February 5, 2007. In the motion, Mr. Garland seeks an order which, if granted, would direct the Government to withdraw its sentencing memorandum filed in the United States versus Judy Gemmill on January 22, 2007 and file an amended version, which omits the following statement, "Defendant Garland directed the fraud and made the most money from it."

To my knowledge, the Government has not filed an answer or otherwise responded to defendant. Garland's motion to strike and memorandum, and I would like to hear from counsel pleural concerning -- and by pleural, I mean from one Government counsel and one defense counsel.

We'll start with the Government concerning the Government's response to this.

MS. FOA: Your Honor, the only rules that permit a defendant to come before the Court, after sentencing and after he has appealed, and after that appeal has been dismissed are Rules 35 and Rules 36 of the Federal Rules of Criminal Procedure.

In the motion to strike, which was filed by Mr. Garland, there is no jurisdictional basis cited for the -- Mr. Garland's application to the Court. There is none which can be cited. There is no jurisdictional basis for this motion. It is not properly before the Court. And we would ask the Court to strike the motion to strike.

In addition, on the merits, there simply is no basis for the claim of Mr. Garland's counsel that he -- that what the Government said is false. Mr. Garland's counsel proposes in his motion that the Government be limited, in essence, to everything it says, from now on, in any circumstance with respect to this case and Mr. Garland, to only those facts which were necessary to the determination of Mr. Garland's guilt.

We dispute that position. We think that is incorrect. But we also think the Court needn't reach the issue on the merits. The matter is not properly before the Court. Mr. Garland, in this matter, is no different from anybody else out in the world who would come to this Court and say, I don't like the way something has been characterized by

the Government. He has no standing. There is no power in the Court to hear this motion.

THE COURT: All right.

MS. DURBIN: Your Honor, I agree with the Government that Mr. Garland has no standing, and I think it's -- what he has to say is not relevant to this particular proceeding. In fact, if it is, I think the Government is -- I have to agree with the Government on this point that he was the director of the fraud and made the most money.

THE COURT: All right. You may take this order, now, this 13th day of February, 2007, upon consideration of the -- not of the -- upon consideration of Defendant -- with a capital D -- Defendant Philip Garland's Motion To Strike -- that's all initial cap, and then back to regular capitalization -- the, well, actually, this is initial caps, as well -- The Government's Sentencing Memorandum, Which Motion Was Filed February 5, 2007 And Which Sentencing Memorandum Was Filed January 22, 2007, In The Within Matter Of The United States of America Versus Judy Gemmill, Criminal

Action Number 04-CR-137-3; It Appearing That Co-Defendant
Garland Who Has Been Previously Sentenced In Criminal Action
Number 04-CR-137-01, Has No Standing To Raise Objections To
The Government Characterizations In Its Sentencing Memorandum
In The Within Matter, Has No -- Has Not Stated A
Jurisdictional Basis For This Court To Entertain The Motion

And Has Not Stated Any Legal Authority In Support Thereof; It Appearing Therefore, That The Garland Motion To Strike Is Not Properly Before This Court; And For the Additional Reasons Articulated By The Government And the Defense At the Gemmill Sentencing Hearing This Date, It Is Ordered That Defendant Philip Garland's Motion To Strike Is Denied By The Court.

At the time of the rendering of the verdict in this Gemmill case on May 6, 2005, I noted the applicability of the Sentencing Reform Act, and I directed that a presentence report be prepared. That report has been prepared, and I have received it and read it. It is dated September 8, 2005, and it was revised and updated on November 7, 2006.

I have also received the following from the Government, the Government's sentencing memorandum filed January 22, 2007. From the defense, the defendant, Judy Gemmill's memorandum in aid of sentencing, which was forwarded to me by cover letter from Attorney Durbin on February 8, 2007

and received in my chambers on February 9, 2007.

Numerous support letters from family and friends for Defendant Gemmill, including letters from MaryJoe Tropper, John A. Tropper, Jenny Lu, spelled capital L-U, Rodgers, R-O-D-G-E-R-S, Heath N. Tropper, Robert E. Rodgers, same spelling, Jenifer, with one F, Dunkin (phonetic), Jone, spelled J-O-N-E, Rodgers, Bob Peters, Lisa Einsig, E-I-N-S-I-G, a second letter from Lisa Einsig, Mike and Eva

DENIAL OF PETITION FOR PANEL REHEARING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1524

UNITED STATES OF AMERICA
v.
PHILIP GARLAND,
Appellant.

SUR PETITION FOR PANEL REHEARING

Present: SLOVITER, BARRY and SILER,[3] Circuit Judges.

The petition for panel rehearing filed by Appellant, Philip Garland, in the above-entitled case having been submitted to the judges who

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[3] The Honorable Eugene E. Siler, Jr., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: February 27, 2009
smw/cc: Michael S. Blume, Esq.
Pamela Foa, Esq.
Ellen C. Brotman, Esq.
Karen M. Ibach, Esq.
Richard L. Scheff, Esq.